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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JAMES H. GOMEZ, Director
Petitioner,

v.

MITCHELL ALFRED PATTERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

APPENDIX
Volume I of II (A - I)

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MITCHELL ALFRED PATTERSON, Petitioner-Appellant, v. JAMES H. GOMEZ, Director, Respondent-Appellee.	)	No. 99-15530 D.C. No. CV-96-01546-DFL **OPINION**

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
December 10, 1999--San Francisco, California

Filed August 16, 2000

Before: Joseph T. Sneed, Harry Pregerson, and
William A. Fletcher, Circuit Judges.

Opinion by Judge W. Fletcher

SUMMARY

Criminal Law and Procedure/Jury Instructions

The court of appeals reversed a judgment of conviction. The court held that a jury instruction that requires a jury to presume that a defendant is sane at the

guilt phase of a murder trial, without providing the legal definition of sanity, violates the Due Process Clause of the Fourteenth Amendment and is not harmless error.

Appellant Mitchell Patterson, who had a history of depression and suicide attempts, drove his wife and children to his wife's parents' home. He was having serious marital and financial difficulties, had not slept for three days, and had discontinued taking his prescribed psychotropic medications. He left his in-law's home with his 10-year-old daughter, Adrianna, and drove until he ran out of gas on the interstate highway near the Nevada border. Patterson and Adrianna were sitting beside the road when a large semi truck approached. Patterson grabbed Adrianna, ran onto the freeway, and lunged in front of the truck. Adrianna was killed.

Patterson was charged with first degree murder in California state court. He pled not guilty and, alternatively, not guilty by reason of insanity. The state court trial was bifurcated into a guilt phase and a sanity phase in accordance with California's standard practice. At the conclusion of the guilt phase trial, the jury was instructed to presume that Patterson was sane. The jury found him guilty of first degree murder. The same jury then hung on the question whether he was sane. A second jury, empaneled to try only the sanity question, found Patterson sane.

After exhausting his direct appeals in state court, Patterson petitioned for a writ of habeas corpus in federal district court, claiming violations of due process because of an alleged insufficiency of the evidence and because of an improper presumption contained in the jury instruction. The district court denied the petition. It then issued a certificate of appealability on Patterson's jury instruction claim.

[1] A jury instruction cannot relieve the state of the burden of proving beyond a reasonable doubt a crucial element of the criminal offense. The Supreme Court has held that the proper inquiry is whether the challenged jury instruction had the effect of relieving the State of the burden of proof on the critical question of petitioner's state of mind. If a reasonable juror could have given the presumption conclusive or persuasion-shifting effect, the instruction is unconstitutional. To determine whether a jury instruction unconstitutionally shifts the burden of proof, courts must inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in an unconstitutional manner.

[2] At the conclusion of the guilt phase, the state court judge instructed the jury to presume that Patterson was sane at the time of the alleged offense. [3] Not only was the instruction not a standard jury instruction in California, but an earlier version of the instruction had been specifically disapproved for use in cases where a specific intent crime was charged if there was evidence of diminished capacity.

[4] Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing that he did not have the specific intent for the crime. If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for first degree murder, that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the non-existence of a mental disease, defect, or disorder depended on the definition of sanity that a reasonable juror could have had in mind.

[5] Under lay definitions of the word "sane" found in a dictionary, the instruction to presume that Patterson was

sane impermissibly relieved the state of its burden to prove beyond a reasonable doubt that defendant had the mental state necessary to commit first degree murder under California law.

[6] To convict a defendant of first degree murder, the state must prove beyond a reasonable doubt that the defendant was guilty of willful, deliberate, and premeditated killing. Where evidence is introduced at trial that a defendant was suffering from a mental disease, defect, or disorder, the jury is entitled to consider evidence of such disease, defect, or disorder in determining whether the defendant actually had the mental state necessary for first degree murder. But if a jury is instructed that a defendant must be presumed sane a reasonable juror could well conclude that he or she must presume that the defendant had no such mental disease, defect, or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty of willfulness, premeditation, and deliberation.

[7] A particular instruction is not considered in isolation, but rather the potentially offending words are considered in the context of the charge as a whole. [8] Nowhere in the trial judge's preliminary or concluding instructions did he explain that the presumption of sanity was the analytical basis for the bifurcated trial; nowhere did he provide the definition of insanity that the jury was asked to presume; and nowhere did he warn the jury that "sane" was being used in something other than the conventional lay sense that the jurors were likely to have had in mind. [9] The guilt phase instruction to presume Patterson was sane was a violation of the Due Process Clause of the Fourteenth Amendment.

[10] A constitutional error is harmless on federal habeas review of a state court conviction unless it had

substantial and injurious effect or influence in determining the jury's verdict.

[11] Patterson's mental state was the primary issue throughout the guilt phase of the trial. He argued that he did not have the mental state necessary for first degree murder. Any presumption that relieved the state of its burden to prove a crucial element of such mental state necessarily played an important role in the jury's ultimate determination of guilt.

[12] Because the *M'Naughten* definition of sanity is harder to satisfy than the lay definition, it was possible that a jury unwilling to find unanimously that Patterson was sane under *M'Naughten* would also have been unwilling, if properly instructed, to find that he had the mental state necessary for first degree murder. [13] The instruction had a substantial and injurious effect or influence in determining the jury's verdict.

COUNSEL

Charles M. Bonneau, Sacramento, California, for the petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

W. FLETCHER, Circuit Judge:

Petitioner Mitchell Alfred Patterson appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner asserts that an instruction requiring the jury to presume him sane at the guilt phase of his murder trial violated the Due Process Clause of the

Fourteenth Amendment. We hold in the circumstances of this case that the instruction was constitutional error, and that the error was not harmless. We reverse the decision of the district court.

I

Petitioner had a history of depression leading up to the events in this case. In 1989, he was hospitalized after an attempted suicide. On March 30, 1993, he was experiencing serious marital and financial difficulties, had not slept for three days, and had discontinued taking his prescribed psychotropic medications. On that day, petitioner drove his wife and three children several hours from their home in Lincoln, California, a town about an hour east of Sacramento, to his wife's parents' home in Willits, about 140 miles north of San Francisco. Later that day, he left with his 10-year-old daughter, Adrianna, ostensibly to buy ice cream. As they left the house, he told his mother-in-law that his "wife will be happy here. This is where she's always wanted to be."

Petitioner drove south to San Francisco, drove back and forth across the Golden Gate bridge at least twice, and then drove about 200 miles east to the Sierra Nevada mountains. Witnesses saw his pickup truck the next morning on the shoulder of Interstate 80 about ten miles east of Truckee, near the Nevada border, where he had run out of gas. At about 11:30 a.m., he used the car phone of a passing motorist to call his wife and ask her to send her sister to pick them up. Several motorists testified that they saw petitioner and Adrianna walking along Interstate 80 between 11:30 a.m. and sometime after 1:00 p.m.

Between 1:20 and 1:25 p.m., petitioner and Adrianna were sitting beside the road, eating a sandwich they had been given by a passing motorist. A large semi truck approached. Petitioner grabbed Adrianna in his arms, ran onto the freeway, and lunged in front of the truck. The

driver swerved into another lane but was unable to avoid them. Adrianna was killed. Petitioner survived with compound fractures in his hands. Petitioner offered various explanations for running in front of the truck: he asserted that it was an "accident"; that he was mentally ill; that he was hallucinating, seeing smoke and people being burned on crosses; that he believed that people were after them who would inflict a "slow and arduous death"; and that he ran onto the freeway to kill himself and Adrianna in order to avoid a worse form of death.

Petitioner was charged with first degree murder in California state court. He pled not guilty and, alternatively, not guilty by reason of insanity. The state court trial was bifurcated into a guilt phase and a sanity phase in accordance with California's standard practice. At the conclusion of the guilt phase trial, the jury was instructed to presume that petitioner was sane. The jury found petitioner guilty of first degree murder. The same jury then hung on the question whether petitioner was sane. A second jury, empaneled to try only the sanity question, found petitioner sane.

After exhausting his direct appeals in state court, petitioner brought a petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254. He asserted violations of due process because of an alleged insufficiency of the evidence and because of an improper presumption contained in the jury instruction. Affirming the findings and recommendation of the magistrate judge, the district court denied the petition. It then issued a certificate of appealability on petitioner's jury instruction claim.

II

We review *de novo* a district court's decision to deny a habeas petition under 28 U.S.C. § 2254. See *Houston v. Roe*, 177 F.3d 901, 905 (9th Cir. 1999). Under the

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we can reverse a state court decision denying relief only if that decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The "Supreme Court need not have addressed a factually identical case[;] § 2254(d) only requires that the Supreme Court clearly determine the law." *Houston*, 177 F.3d at 906. "[O]ur independent review of the legal question . . . [must] leave[ ] us with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the court adopted, was erroneous -- in other words that clear error occurred. " *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000).

III

We first address whether the jury instruction violated the Due Process Clause of the Fourteenth Amendment.

A

[1] A jury instruction cannot relieve the state of the burden of proving beyond a reasonable doubt a crucial element of the criminal offense. In *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979), the Supreme Court held the proper inquiry to be "whether the challenged jury instruction had the effect of relieving the State of the burden of proof . . . on the critical question of petitioner's state of mind." If a "reasonable juror could have given the presumption conclusive or persuasion-shifting effect," the instruction is unconstitutional. *Id.* at 519. In *Francis v. Franklin*, 471 U.S. 307, 325 (1985), the Supreme Court held that an instruction was unconstitutional "[b]ecause a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent[.]"

We have held that to determine whether a jury instruction unconstitutionally shifts the burden of proof, we must inquire "'whether there is a reasonable likelihood that the jury has applied the challenged instruction' in an unconstitutional manner." *Houston*, 177 F.3d at 909 (citations and quotations omitted).

In both *Sandstrom* and *Francis*, the Supreme Court held jury instructions invalid for unconstitutionally shifting the burden of proof.[1] In *Sandstrom*, the defendant admitted killing the victim but contended that he did not have the required mental state. If the defendant had acted "purposely or knowingly," he would have been guilty of

---

1. We applied *Sandstrom* and *Francis* in *McKenzie v. Risley*, 842 F.2d 1525 (9th Cir. 1988) (en banc), a capital murder case in which the defendant had been convicted of "deliberate homicide" under Montana law. We were split as to whether the errors were harmless, but we were unanimous in holding that the jury instructions violated due process. We quoted samples of the flawed instructions in our opinion:

> [T]he law presumes, that is, the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act.
>
> . . . .
>
> Further, unless you are otherwise instructed with regard to a particular presumption, all presumptions are rebuttable; that is, they may be controverted and overcome by other evidence.

Id. at 1529. We wrote:

> Similar instructions were given on the elements of various offenses. While these instructions did not require the jury to conclusively presume intent, they did permit a rational juror to believe that intent could be found without proof by the prosecution, thereby shifting the burden of proof on this issue to the defense.

Id. at 1529-30.

"deliberate homicide" under Montana law; but if he had acted without that mental state, he would have been guilty of a lesser degree of homicide. After having been instructed that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," the jury convicted defendant of "deliberate homicide." *Sandstrom*, 442 U.S. at 513. The Supreme Court held that the instruction violated due process:

> Given the common definition of 'presume' as 'to suppose to be true without proof,' Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.
>
> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption.
>
> Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent.
>
> * * *
>
> [T]he question before this Court is whether the challenged jury instruction had the effect of

> relieving the State of the burden of proof enunciated in [*In re*] *Winship* on the critical question of petitioner's state of mind. We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error.

Id. at 517, 521 (emphasis in original).

In *Francis*, defendant was convicted under Georgia law of "malice murder," which required the defendant to have acted with malice aforethought. The prosecution contended that defendant had fired the fatal shot deliberately. The defendant contended that he had done so accidentally. The challenged instruction was:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

Francis, 471 U.S. at 311. The Court held that the instruction violated due process:

> The federal constitutional question is whether a reasonable juror could have understood the two sentences as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts.

* * *

> The court today holds that contradictory instructions as to intent--one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion--create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge explains the infirm language sufficiently to eliminate this possibility. If such a reasonable possibility of an unconstitutional understanding exists, "we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction."

Id. at 316, 322 n.8 (quoting *Sandstrom*).

B

When a defendant pleads not guilty and, in the alternative, not guilty by reason of insanity, California conducts a bifurcated trial.[2/] In the first phase, the defendant's guilt is determined without reference to his plea of insanity. If defendant is found guilty, the trial goes on to a second phase in which his legal sanity is determined. Petitioner in this case contended during the guilt phase that he did not have the requisite mental state for first degree murder. During the sanity phase, petitioner contended that he was insane.

---

2. When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.

Cal. Penal Code § 1026.

First degree murder is defined under California law as "murder"[3] that is a "willful, deliberate, and premeditated killing." Cal. Penal Code § 189. Sanity is defined using a modernized version of the *M'Naghten* Rule: a person is insane if he or she is "incapable of knowing or understanding the nature and quality of his or her act [or] of distinguishing right from wrong at the time of the commission of the offense. " Cal. Penal Code. § 25(b); see also *People v. Skinner*, 39 Cal. 3d 765, 768 (1985).

The problem in this case does not lie with California's bifurcated system under which guilt and sanity are determined in separate phases of the trial. Nor does it lie with California's legal definitions of first degree murder or sanity. Rather, the problem lies with what the jury was told to presume about petitioner's mental state.

At the conclusion of the guilt phase, the judge gave the following instruction:

> Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the Information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state which is an element of the crime charged in the Information, and are [sic] found in the definitions of murder.
>
> If from all the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state

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3. Murder is "the unlawful killing of human being . . . with malice aforethought." Cal. Penal Code § 187. Malice aforethought is "a deliberate intention unlawfully to take away the life of a fellow creature." *Id.* § 188.

> or had the necessary specific intent, you must find that he did not have such mental state or specific intent.
>
> *At the time of the alleged offense charged in the Information, you were [sic] instructed to presume that the defendant was sane.*

(emphasis added).

[2] The first paragraph is closely patterned after California Jury Instructions -- Criminal (CALJIC) § 3.32. The second paragraph is a specific application of the general jury instruction on reasonable doubt. See *generally* CALJIC § 2.90. The italicized last paragraph is the instruction challenged in this case. It is an accurate technical statement of the law, comporting with California's system of bifurcated trials, but it is not a standard jury instruction in California.

[3] The California Court of Appeal in this case specifically noted that the challenged instruction is not a standard jury instruction. We would go further. Not only is it not a standard instruction, but an earlier version of this instruction was specifically disapproved for use in cases like the one now before us. In the 1970 edition of CALJIC, § 3.34 provided as follows:

> The intent with which an act is done is shown by the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act.
>
> [For the purposes of the case on trial, you must assume that the defendant was of sound mind at the time of his alleged conduct which, it is charged, constituted the crime described in the information.]

A "Use Note" appended to § 3.34 warned against using the bracketed paragraph: "Do not give second paragraph in a specific intent crime if there is evidence of diminished capacity."

The California Supreme Court in *People v. Burton*, 6 Cal.3d 375 (1971), analyzed a still-earlier CALJIC instruction that had simultaneously instructed the jury to determine the defendant's intent and to presume that the defendant was sane. The court wrote, "There is certainly a potential conflict in [the earlier] instruction that could well mislead the jury." *Id.* at 390. The court then approved the newly adopted 1970 CALJIC § 3.34 and its appended Use Note: "We are satisfied that this is a correct and fully adequate way to handle the situation."
Id. at 391.

[4] The problem with the instruction given in this case is that it tells the jury to presume a mental condition that -- depending on its definition -- is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime. Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing

that he did not have the specific intent for the crime.[4] In a first degree murder case, the evidence would be used to show that he did not willfully deliberate and premeditate the killing. If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for first degree murder, that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the nonexistence of a mental disease, defect, or disorder depends on the definition of sanity that a reasonable juror could have had in mind.

C

[5] The Supreme Court's source in *Sandstrom* for the lay definition of "presume" was the 1974 edition of Webster's New Collegiate Dictionary. Using the most recent edition of that dictionary, we find the following definitions of "sane": "1: proceeding from a sound mind: RATIONAL 2: mentally sound; *esp*: able to anticipate and

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4. Under current California law, evidence of mental disease, defect or disorder is not admissible to show diminished capacity per se, but it is admissible to show whether a particular defendant actually had the mens rea required for a specific intent crime:

> Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

Cal. Penal Code § 28(a).

appraise the effect of one's actions[.]" Merriam Webster's Collegiate Dictionary 1035 (1998). Under these definitions, the instruction "to presume that the defendant was sane" impermissibly relieves the state of its burden to prove beyond a reasonable doubt that defendant had the mental state necessary to commit first degree murder under California law.

[6] In order to convict a defendant of first degree murder, the state must prove beyond a reasonable doubt that the defendant was guilty of "willful, deliberate, and premeditated killing." Where, as here, evidence is introduced at trial that a defendant was suffering from a mental disease, defect, or disorder, the jury is entitled to consider evidence of such disease, defect, or disorder in determining whether the defendant actually had the mental state necessary for first degree murder. But if a jury is instructed that a defendant must be presumed "sane" -- that is, "rational" and "mentally sound," and "able to anticipate and appraise the effect of [his] actions," -- a reasonable juror could well conclude that he or she must presume that the defendant had no such mental disease, defect, or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty of willfulness, premeditation, and deliberation.

[7] Under *Francis*, we do not consider a particular instruction in isolation, but rather consider "the potentially offending words . . . in the context of the charge as a whole." 471 U.S. at 315. Even interpreting "charge" broadly (probably more broadly than *Francis* intended) to include preliminary as well as concluding instructions, we believe that the instruction was constitutionally flawed.

[8] At the beginning of the trial, the judge instructed the jury as follows:

> At the conclusion of the testimony in the case in what's called the guilt phase, there will then be oral arguments by the attorneys where they will try to sum up and explain to you exactly what they think the evidence is proved. I will also give you a set of instructions at that time that include all of the instructions other than what are called the concluding instructions, which obviously means I conclude the trial with them after all the arguments are over. Then you will be asked to go out and deliberate on the issue of guilt or innocence. If you return a verdict in that particular case on that particular phase, that will determine where we go from there. And if we have a sanity phase, it is a little different as you heard. Because in the sanity phase the defendant has the burden of proof; and, therefore, he goes first rather than the People. And he presents his evidence. And then they present their evidence after he presents his evidence.

A short time later, the judge reiterated that the guilt phase would come first and the sanity phase second. At the end of the trial, as part of his instructions at the close of the evidence, the judge gave the challenged instruction. Nowhere in his preliminary or concluding instructions did the judge explain that the presumption of sanity was the analytical basis for the bifurcated trial; nowhere did he provide the *M'Naghten* definition of insanity that the jury was asked to presume; and nowhere did he warn the jury that "sane" was being used in something other than the conventional lay sense that the jurors were likely to have had in mind.

[9] We hold that the guilt phase instruction to presume the defendant was sane was a violation of the Due Process Clause of the Fourteenth Amendment. The California Court of Appeal's decision that there was no error was, in the words of AEDPA, "contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court wrote in *Francis*,

> Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of *intent*, and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause.

471 U.S. at 325 (emphasis added). If the italicized word "intent" is changed to "mental state," this language captures our case precisely. AEDPA sets a high standard, but it is satisfied in this case.

We are reluctant to tell the California courts precisely what jury instruction we think they should use in a case such as this, for so long as California's jury instructions comply with the Due Process Clause of the Fourteenth Amendment, we have no authority to choose one instruction over another. As a logical matter, the trial court could have instructed the jury to presume that the defendant was sane; explained to the jury the precise relationship between the first and second phases of the trial; and explained the legal definition of sanity under *M'Naghten* that the jury is asked to presume. Perhaps because of the potential for jury confusion, however, California courts have not chosen to proceed this way. Even if it were our place to do so, we would not quarrel with that choice.

The simplest solution may also be the best solution. We would have found no due process violation in this case if the challenged instruction had simply been omitted. This

was the solution adopted for comparable cases in the 1970 edition of CALJIC § 3.34 and endorsed by the California Supreme Court in *People v. Burton*. We infer from the omission of the challenged instruction from the standard instructions in CALJIC that it is also California's solution under current law.

IV

[10] We next address whether the error was harmless. A constitutional error is harmless on federal habeas review of a state court conviction unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotations and citations omitted). "[W]here a judge, in a habeas proceeding, applying this standard of harmless error, is in grave doubt as to the harmlessness of an error, the habeas petitioner must win." *California v. Roy*, 519 U.S. 2, 5 (1996) (internal quotation marks and citations omitted); see also *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000).

[11] Petitioner's mental state was the primary issue throughout the guilt phase of the trial. Petitioner put on a great deal of evidence of his mental state, including extensive expert psychological testimony. Based on this evidence, he argued that he did not have the mental state necessary for first degree murder. Any presumption that would have relieved the state of its burden to prove a crucial element of such mental state necessarily played an important role in the jury's ultimate determination of guilt.

Aware of the importance of petitioner's evidence concerning his mental state, and equally aware of the importance of the presumption of sanity, the prosecutor in closing argument repeatedly relied on the presumption to tell the jury that petitioner's evidence was legally irrelevant and must be disregarded. The prosecutor argued:

> Mr. Patterson is presumed to be sane. And that [,] in this stage of the proceeding[,] is the law .... [W]hen Mr. Patterson called the psychiatrists[,] he called at the guilt phase and in a sense has put the cart before the horse. Mr. Patterson has attempted to show that because of his mental condition, he didn't form an intent, the intent required or [sic] premeditate or deliberate. . . . The basis of opinions -- and you're going to be instructed to basically disregard any opinion that goes to the ultimate fact. You heard-- *the instruction says any opinion from a psychiatrist that goes to intent, premeditation or the ultimate fact[,] disregard. That's the law. At this stage of the proceeding you are to do that. You are to presume he's sane. You are not to accept that opinion.*

(emphasis added). The prosecutor continued:

> Those are the elements. Unlawful killing of a human being with malice aforethought and for first degree murder willful, deliberate, premeditated. We talked about motive not being an element. But the motive was provided for us simply by Mr. Patterson. *He's presumed to be sane in this stage of the proceeding. He was sane.*

(emphasis added).

[12] After the jury returned a verdict of guilty, that same jury was asked to decide whether petitioner was sane under the *M'Naghten* definition of sanity. The jury hung on that question, and a second jury was empaneled to determine whether petitioner was sane. Because the *M'Naghten* definition of sanity is harder to satisfy than the lay definition, it is difficult to escape the conclusion that a jury unwilling to find unanimously that petitioner was sane under *M'Naghten* would also have been unwilling, if

properly instructed, to find that petitioner had the mental state necessary for first degree murder.

[13] We therefore have "grave doubt" about the harmlessness of the erroneous instruction, *Roy*, 519 U.S. at 5, and believe that it "had a substantial and injurious effect or influence in determining the jury's verdict," *Brecht*, 507 U.S. at 637.

V

We conclude that the challenged jury instruction violated the Due Process Clause of the Fourteenth Amendment and that the error was not harmless. We therefore REVERSE the district court's denial of Patterson's habeas petition, and REMAND the case to the district court with instructions to grant the writ, unless the State of California grants Patterson a new trial within a reasonable period to be set by the district court.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MITCHELL ALFRED PATTERSON Petitioner-Appellant, vs. JAMES GOMEZ, Respondent.	No. 99-15530 D.C. No. CV-96-01546 DFL **ORDER** FILED: Sept. 11, 2000

Before: W. FLETCHER, Circuit Judge

Upon due consideration of Appellee's motion for stay of the mandate of this Court in the above cause pending the filing of a petition for writ of certiorari,

IT IS ORDERED that the motion for stay of mandate be **GRANTED.**[1]

1. In the event that the petition for writ of certiorari is timely filed, "the stay shall continue until final disposition by the Supreme Court." Fed.R.App.P.41(d)(2)(B).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MITCHELL ALFRED PATTERSON Petitioner, vs. JAMES GOMEZ, Respondent.	No. CIV S-96-1546 DFL GGH P **ORDER** FILED: Feb. 25, 1999

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's December 17, 1998, denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

For the reasons set forth in the magistrate judge's May 22, 1998, findings and recommendations, petitioner has not made a substantial showing of the denial of a constitutional right on his claim of insufficient evidence. However, the court grants a certificate of

appealability on petitioner's claim that due process was violated by the trial court's instruction that defendant was presumed to be sane.

IT IS SO ORDERED.

DATED: 2/24/1999

David F. Levi
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MITCHELL ALFRED PATTERSON Petitioner, vs. JAMES GOMEZ, Respondent.	No. CIV S-96-1546 DFL GGH P **ORDER** FILED: Dec. 17, 1998

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On May 22, 1998, the magistrate judge filed findings and recommendations herein which were served on petitioner and which contained notice to petitioner that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed May 22, 1998, are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is denied.

DATED: December 16, 1998.

David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MITCHELL ALFRED PATTERSON	)	
Petitioner,	)	No. CIV S-96-1546 DFL GGH P
vs.	)	
JAMES GOMEZ,	)	**FINDINGS AND RECOMMENDATIONS**
Respondent.	)	FILED: May 22, 1998

1. Introduction

Petitioner is a state prisoner represented by counsel and proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1994 conviction for first degree murder on March 31, 1993 (Penal Code § 187(a)), for carrying his ten year old daughter onto a freeway and throwing her in front of a semi truck.

After separate guilt and sanity phases, petitioner was sentenced to 25 years to life.
Exh. D at 3.

In the instant petition, petitioner raises two grounds for relief: (1) that petitioner's due process rights under the Fourteenth Amendment were violated when the trial court instructed the jury during the guilt phase that petitioner was presumed to be sane, thereby relieving the prosecution of the burden of proving premeditation and

deliberation, and nullifying defense evidence that petitioner had a severe mental disorder; and (2) that there was insufficient evidence of premeditation and deliberation to sustain the verdict.
Petition, filed August 28, 1996, at 4-5.

After carefully reviewing the record, the court has determined that the petition should be denied in this tragic case.

II. Background[1/]

> [Petitioner] suffers from depression and was hospitalized in 1989 for attempting suicide. Although prescribed psychotropic medication, he discontinued its use.
>
> On March 30, 1993, [petitioner] had not slept in three days and was experiencing serious marital and financial problems. On that day, [petitioner], his wife, and their three children arrived at the Willits home of petitioner's in-laws. He later left with his 10-year-old daughter Adrianna to buy ice cream. As they were leaving, he told his mother-in-law that his wife "will be happy here. This is where she's always wanted to be." When the two did not return, petitioner's wife called the California Highway Patrol.
>
> [Petitioner] drove Adrianna to San Francisco, where he drove back and forth across the Golden Gate Bridge at least twice. The following morning, witnesses saw [petitioner's] pickup truck parked on Interstate 80 near Floriston, roughly 10 miles east of Truckee.
>
> At approximately 11:30 a.m. on March 31, 1993, [petitioner] telephoned his wife from a passing motorist's car phone, and asked her to send his sister to pick him up. [Petitioner's] sister

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1. The background facts are quoted from the Court of Appeals Opinion, Exhibit D to Respondent's Answer.

departed to pick up [petitioner] and Adrianna between noon and 1 p.m.

Several motorists testified to seeing [petitioner] and a young girl walking along Interstate 80 between 11:30 a.m. and 1:25 p.m. Between 1:20 and 1:25 p.m., as [petitioner] and Adrianna remained alongside the freeway eating a sandwich given them by a passing motorist, a semi truck approached. When the truck was within 100 feet, [petitioner] grabbed Adrianna and ran onto the freeway. The driver swerved into another lane, but petitioner continued, and with a "determined" expression, lunged at the truck. Adrianna was killed; both [petitioner's] hands were fractured.

[Petitioner] offered inconsistent explanations for his behavior, first contending it was an "accident" and subsequently asserting he was mentally ill, was hallucinating, and believed he had to kill himself and Adrianna to avoid a bizarre and tortured death.

[Petitioner] pled not guilty and not guilty by reason of insanity. At the conclusion of the guilt phase, the jury found [petitioner] guilty of first degree murder. In the sanity phase, the first jury deadlocked and the court declared a mistrial. After retrial, the jury found [petitioner] sane. The court imposed a sentence of 25 years to life.

III. Standard of Review

The Antiterrorism and Effective Death Penalty Act (AEDPA) applies to this petition which was filed after the effective date of the AEDPA. *Neeley v. Nagle*, 138 F.3d 917 (11th Cir. 1998). The so called "presumption of correctness" of state court legal rulings aspect of the habeas amendments comes into play at this point, and as discussed below, the AEDPA amendments call for a significantly different analysis in this case from that under

the prior law. The court will expend some time discussing it.

Section 2254(d) reads as follows:

> (d) an application for a writ of habeas corpus on behalf of a person in custody shall not be granted with respect to any claim *that was adjudicated on the merits in State court proceedings* unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (emphasis added)

Except for a concise recitation of the statutory provisions found in *Jeffries v. Wood*, 114 F.3d 1484, 1498 (9th Cir. 1997), the Ninth Circuit has not discussed the AEDPA amendments with respect to state court legal rulings, both pure law questions and issues of mixed fact and law. The Circuits that have had occasion to discuss it thus far have split on the appropriate analytical methodology. The First Circuit does not break down the issue by whether it is one of mixed fact or pure law, but rather asks two questions: is there a Supreme Court case on point, and if not, whether the state court ruling involves an unreasonable application of established Supreme Court law. *Martin v. Bissonette*, 1997 WL 280602

(May 1997) *opinion withdrawn on other grounds and new opinion issued*, 118 F.3d 871 (1st Cir. 1997). The Fifth and Seventh Circuits first inquire whether the issue involved is one of pure law, a mixed fact and law question, or one of pure fact. If the question is one of pure law, the decision of the state court may only be overturned if it is contrary to established Supreme Court authority. If the question is mixed law and fact, the state determination is upheld unless it constituted an unreasonable application of Supreme Court authority. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996), *rvsd on other grounds,* 117 S. Ct. 2059 (1997); *Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996). An application of law to facts is "unreasonable," "only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect." *Id.* At 769. However, the differences in approach may be more semantical than substantive in that the application of either will generally lead to the same result. *Harpster v. State of Ohio*, 128 F.3d 322, 327 (6th Cir. 1997). *See also Neeley v. Nagle, supra.*

The question left unanswered by the above cases, however, is to what extent Circuit authority is pertinent that explicates the controlling Supreme Court decisions. Of course, if the Circuit has created a new rule, none would find that such a rule qualifies as Supreme Court authority. However, when the Circuit applies a Supreme Court ruling to an analogous or slightly different factual setting, is the Circuit holding in the analogous situation one that should be substituted for a direct holding of the Supreme Court? Given the express words of the statute, this court finds that Circuit authority is persuasive, but not binding. If the Circuits explicate the federal issue in question in the same manner, and such explication is based on Supreme Court authority, the lower court should follow the unanimous opinions of the Circuits.[2/] If

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2. If, however, the Ninth Circuit, applying AEDPA standards, issued an opinion in a substantively identical case holding that the state courts had been unreasonable in their application of Supreme

however, the Circuits are split, one could not say that reasonable jurists are all of one viewpoint.

IV. Discussion

A. Jury Instruction Regarding Presumption that Petitioner was Sane

Petitioner's first claim is that the trial court erroneously instructed the jury during the guilt phase that petitioner was presumed to be of sound mind, thus nullifying the defense case that petitioner had a severe mental disorder. Petitioner further argues that this instruction relieved the prosecution of its burden to demonstrate that petitioner premeditated and deliberated the death of his daughter.

The portion of the instruction objected to by petitioner is taken from California Penal Code § 1026(a) and reads: "At the time of the alleged offense charged in the Information, you were (sic) instructed to presume that the defendant was sane." RT 1670.[3]

The California Court of Appeals based its denial of this claim on the following reasoning:

> "[I]nstructions must be viewed as a whole and in light of other instructions given by the court to the jury."[4] *(People v. Russell* (1971) 22

Court precedent, such a holding would be binding on the Ninth Circuit district courts.

3. The actual code section states in part:

(a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.

4. At oral argument, defendant cited *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344], which concerned jury instructions that

Ca1.App.3d 330, 336.) Immediately before the challenged instruction, the court instructed the jury: "Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state or specific intent which is an element of the crime charged in the information, and are found in the definitions of murder. [¶] If from all the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent." Accordingly, the combination of the two instructions set forth the correct balance, and did not tell the jury to ignore the mental state evidence.

At oral argument, echoing a weak statement from his opening brief, defendant argued it was error to give this instruction because it precluded the jury from considering the evidence of his mental instability in making its guilt phase determination. Defendant cites no authority for this proposition, and his assertion of error is unsupported by the record.

Defendant pled not guilty by reason of insanity, and accordingly his trial was bifurcated. (See *People v. Phillips* (1979) 90 Cal.App.3d 356, 362; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 542.) It is undisputed that the trial court

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effectively relieved the State of its burden of proof on criminal intent. As explained above, the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed "the mental state or specific intent" necessary for murder. We find *Francis* inapposite.

> correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase. By giving the challenged latter instruction, the trial court merely told the jury it could not consider in the guilt phase whether defendant was insane. (See *People v. Smith* (1973) 33 Cal.App.3d 51, 75, overruled on other grounds, *People v. Wetmore* (1978) 22 Ca1.3d 318, 324.)
>
> Evidence of defendant's mental condition was fully developed and argued by both sides, and the trial court never told the jury it could not consider evidence of defendant's mental condition as it bore on issues pertinent to guilt. The trial court fully instructed the jury relative to its duty to consider the evidence of defendant's mental condition and the prosecution's burden to establish defendant's guilt beyond a reasonable doubt. Defendant's opening brief asserts, "[b]y instructing the jury that the defendant is presumed to be sane, the trial court in effect told the jury that evidence raising a doubt of appellant's mental state at the time of the incident was not relevant or worthy of belief." However, something more is required than defendant's mere assertion the instruction had this effect or somehow affected the burden of proof. We note trial counsel did not take issue with the challenged instruction. This is an important point because trial counsel was better positioned to assess and pursue the matter.

Exh. D at 10-12.

In addition to instructing the jury that it could consider evidence of defendant's mental disorder in determining his intent, as well as to presume defendant was sane, the trial court immediately followed these instructions with the definitions of murder and the intent

level that must be proved, including malice aforethought and willful deliberation and premeditation. *See* RT 1670-72. The court also described the different degrees of homicide and instructed that in order to find first degree murder, the jury must find that malice aforethought and deliberation and premeditation were proved beyond a reasonable doubt. RT 1670, 1672, 1674. The court additionally instructed the jury that petitioner was presumed innocent until proven guilty beyond a reasonable doubt by the People who had the burden of proof. RT 1668.

Petitioner does not assist his case in essentially arguing that the AEDPA changed nothing with respect to the standard of review of a state court's legal rulings, and that the federal court should review the legal issue de novo. As set forth above, in order to obtain relief here, petitioner would have to show that the state court's ruling was not debatable among jurists of reason in terms of application of Supreme Court authority pertinent to similar due process arguments. This petitioner has not done. Indeed, even the pre-AEDPA law applicable to very similar situations held that an instruction as to the presumption of sanity did not violate due process. *McKenzie v. Risley*, 842 F.2d 1525, 1534-1535 (9th Cir. 1988) (en banc) (exhaustively reviewing Supreme Court "burden shifting" cases cited by petitioner herein throughout opinion, and holding that a presumption of sanity instruction did not confuse the jury or raise a presumption/burden shifting error on mens rea issue); *see also Knaubert v. Goldsmith*, 791 F.2d 722 (9th Cir. 1986) (presumption of sanity instruction in light of all the instructions did not taint sanity determination). Because the *McKenzie* case stands for the proposition that reasonable jurists can interpret Supreme Court authority as did the California court, petitioner's presumption/shifting burden of proof claim herein fails.

The key distinction between this case, as exemplified by *McKenzie*, and the Supreme Court case of *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965 (1985),

upon which petitioner so heavily relies is that in *Francis* the jury was instructed that the fact of a sound mind gave rise to a presumption on the intent issue, id. at 315, 1971-1972. No such presumption as to the mens rea issue was asserted in the instant case. As in *McKenzie*, the jury herein was only instructed that petitioner's sanity was presumed-there was no instruction link-up (as in *Francis*) between his sanity and the mens rea issues.

B. Sufficiency of the Evidence

Petitioner's second claim is that there was insufficient evidence of premeditation to support a conviction for first degree murder. When a challenge is brought alleging insufficient evidence, federal habeas corpus relief is available only if it is found that upon the record evidence adduced at trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307, 324 (1979). Under *Jackson*, this standard must be applied with reference to the substantive elements of the criminal offense as defined by state law. *Id.* at 324 n.16. Moreover, the court must review the entire record when the sufficiency of the evidence is challenged on habeas. *Adamson v. Ricketts*, 758 F.2d 441, 448 n. 11 (9th Cir. 1985), *vacated on other grounds*, 789 F.2d 722 (9th Cir. 1986) (en banc), *rev'd*, 483 U.S. 1 (1987).

It is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. 307, 319. "The question is not whether we are personally convinced beyond a reasonable doubt. It is whether rational jurors could reach the conclusion that these jurors reached." *Roehler v. Borg*, 945 F.2d 303, 306 (9th Cir. 1991). Under *Jackson*, the federal habeas court determines sufficiency of the evidence in reference to the substantive elements of the criminal offense as defined by state law. *Jackson*, 443 U.S. 307, 324 n.16.

Under California law, first degree murder is defined as the willful, deliberate, and premeditated killing of a human being with malice aforethought. Cal. Penal Code §§ 187(a), 189. "'The word "deliberate" means formed or arrived or determined upon as the result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.'" *People v. Perez*, 2 Cal. 4th 1117, 1123 (1992) (quoting CALJIC 8.20). The intent to kill must have been "formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." *Id.* This intent cannot be "a mere unconsidered and rash impulse"; rather, "the slayer must weigh and consider the question of killing and the reasons for and against such choice and, having in mind the consequences, he decides to and does kill." (*Id.*)

At least three types of evidence support a finding of premeditation and deliberation: "(1) planning activity; (2) motive; and (3) manner of killing." *Id.* at 1125 (citing *People v. Anderson*, 70 Cal. 2d 15, 27 (1968)). In *Anderson*, the California Supreme Court stated: "Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." *People v. Anderson*, 70 Cal. 3d at 27.

In the instant case, there was ample evidence of planning, from the time petitioner left his in-laws' home in Willits. Petitioner's mother-in-law testified that immediately before leaving the house with Adrianna, he told her, "Sheila [petitioner's wife] will be happy here. This is where she's always wanted to be." RT 123. Petitioner stated to Dr. Lyons, a psychiatrist for the prosecution, that Adrianna wanted to leave her grandparents' house with petitioner, and "she did not know that she would not be coming back. I told her I would take her to see the Golden Gate Bridge." RT 1453. Petitioner next drove to the Golden Gate Bridge, and went across it a few times. RT. 167. These statements and

acts indicate petitioner's planning and reflection of his intended crime.

It is true that petitioner also stated to Dr. Lyons that he knew it was wrong but "that is beside the point because I was under delusions at the time. And I felt I had to get out of there and go to a less populated area where it was more peaceful and safer. I felt it was saving my daughter." *Id.* These statements could possibly be interpreted as indicating either mental problems, or the lack of intent to kill, but they could likewise be interpreted as "saving" Adrianna from this world by killing her, and apparently were so interpreted by the jury.

This latter inference was bolstered by petitioners' statements to Dr. Winer, "that he thought that killing both his daughter and himself would be far better than what people had in store for them." RT 617-18. Although petitioner also told this defense psychiatrist that he saw people being burned to death on the freeway, indicating delusions and psychosis; RT 618, 624; the jury rationally could have chosen to draw the inference of intent.

Numerous witnesses who interacted with petitioner on the freeway and after the event that day testified that his demeanor seemed normal and rational, and that they did not notice anything unusual. See RT 131 (Austin Hodges - petitioner's father-in-law), RT 201-02 (Eugene Sweetland, Jr., freeway witness), RT 237-40 (Robert Riley - CHP officer on freeway), RT 252 (Ty Brown - CHP officer on freeway), RT 284 (Judy Tye - freeway witness), RT 300 (Brad Deboer - service station owner to whom petitioner attempted to sell his truck on March 31, I 993), RT 328 (Robert Carpenter - CHP officer), RT 388-89 (Gary Botto - paramedic fire captain), RT 400 (Guy Mohun - paramedic), RT 458 (Elizabeth Rehkop - deputy sheriff), RT 602 (Don Bossingham - CHP captain commander), RT 926 (Dr. Bittle - court appointed psychiatrist), and RT 1477 (Dr. Lyons - prosecution psychiatrist).

The evidence also indicated that petitioner was on the side of the freeway for a couple of hours,

apparently deciding whether to commit suicide and take Adrianna with him. RT 952. This length of time is persuasive evidence of deliberation and premeditation. The act which followed was thus less likely the result of an impulsive, unplanned or rash decision.

Dr. Bittle, a court appointed psychiatrist, testified that in his opinion petitioner was actively suicidal at this time. *Id.* This information was considered by the jury who found premeditation despite this and other similar testimony.

Other evidence of planning include statements to witnesses on the freeway that he wanted to do something about his problems and stated that he "thought about it, but [he] would never do it or could never do it." RT 390. The witness was not allowed to clarify what petitioner meant by this statement because it called for speculation, but the jury could infer, based on petitioner's prior statement to this witness regarding his family problems, that petitioner was referring to suicide. RT 389.

Also indicative of petitioner's intent was the testimony of Mr. Preeble, the truck driver whose truck hit petitioner and his daughter. He stated that petitioner looked at him as he was approaching on the freeway, and when the truck was about 100 feet away, petitioner picked up the girl and ran into the highway. RT 260. He described petitioner's approach to the truck as "a dead run just right straight for my truck," with a "very serious . . . look of determination." *Id.* The trucker continued by stating that "it appeared to [him] that [petitioner] was going to throw the girl out in front of my truck just the way he had her." RT 261.

Also introduced into evidence was a tape recording of petitioner's interview with law enforcement, dated April 1, 1993, the day after the incident, in which petitioner stated, "I think I stopped thinking about it and just did it." RT 971. Dr. Bittle testified that in his opinion, this statement "implies that [petitioner] had been contemplating and considering this behavior which and [sic] resulted in this tragedy and that there was some

control over this behavior in this decision to initiate this action." RT 971. Dr. Lyons testified that petitioner told him: "I tried to commit suicide with my daughter in my arms. I thought someone was out to get us real bad. I thought it would be quicker and easier than what was going to happen . . . I knew it was not going to be something simple by being shot. Maybe it would be torture." RT 1453. This comment indicates that petitioner had considered the method of killing in advance. The opinion of Dr. MacQuarrie, a physician and director of emergency services at Tahoe Forest Hospital who examined petitioner after he was admitted to the hospital following the event, was further evidence of intent. This doctor testified that in his opinion petitioner was not only not delusional when examined by him, but appeared to be lying about the event and kept changing his version of the story. RT 97, 100.

Although petitioner had problems which could have led to his mental deterioration, these problems also provided a motive for his plan to commit a "murder-suicide." There was evidence of financial problems, including lost work due to a back injury, being laid off within a couple of years later, and loss of his own carpet cleaning business. RT 143, 144, 145. These problems caused petitioner and his family to get four months behind on rent. RT 146. Petitioner also lost his mother, brother and best friend to death at about the same time. RT 147. Additionally, petitioner had marital problems. RT 154, 162, 175. Petitioner also told one freeway witness, Judy Tye, that his daughter "hadn't had two minutes of happiness in her life and that he wanted to get her back to her sister's." RT 278. Although this statement might indicate a lack of intent to kill his daughter, it could also point to petitioner's intent to save his daughter from the miserable remainder of her life by killing her. A rational jury could have made the determination either way.

Petitioner stresses his argument that he was suicidal and that due to his mental illness he could not form the requisite state of mind which required careful

thought and weighing of the consequences of the act of killing. The jury had petitioner's evidence of his mental state and chose instead to believe the prosecution's version of which there was support in the record. No less than five psychiatrists testified, including two for the prosecution and two for the defense, as well as a court appointed psychiatrist. There was evidence in support of each party's position as to petitioner's mental state. In essence, the jury had to choose from two scenarios: (1) petitioner's disordered state of mind precluded premeditation and deliberation; and (2) petitioner was distraught, and wrestled with his conscience, but ultimately decided to kill his daughter. The fact that prior to the killing petitioner was torn between his irrational desire to end his daughter's life and his knowledge that this was wrong, does not mean he did not deliberate his actions, or have the capacity to do so.

The fact that petitioner can construct from the evidence alternative, reasonable scenarios at odds with the jury's verdict, does not mean that the evidence was insufficient, i.e., that no reasonable jury could have found the conviction scenario beyond a reasonable doubt.

> In reviewing the sufficiency of the evidence supporting a conviction, we search the record to determine "whether a reasonable jury, after viewing the evidence in the light most favorable to the government, could have found the defendants guilty beyond a reasonable doubt of each essential element of the crime charged." *United States v. Douglass*, 780 F.2d 1472, 1476 (9th Cir.1986). *The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict. United States v. Fleishman*, 684 F.2d 1329, 1340 (9th Cir.), cert. denied, 459 U.S. 1044, 103 S. Ct. 464, 74 L.Ed.2d 614 (1982); *United States v. Federico*, 658 F.2d 1337, 1343 (9th Cir.1981), overruled on other grounds, *United States v. De*

Bright, 730 F.2d 1255, 1259 (9th Cir.1984) (en banc).

United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991) (emphasis added).

Returning to the standard of review here, the California appellate court did not unreasonably apply Supreme Court precedent on the issue of sufficiency of the evidence. Petitioner's sufficiency of the evidence claim should be denied.

IV. CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 22, 1998.

GREGORY G. HOLLOWS
U.S. MAGISTRATE JUDGE

APPENDIX F

Third Appellate District No. C019177
S050510

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

MITCHELL ALFRED PATTERSON, Appellant

Appellant's petition for review DENIED.

FILED: Feb. 14, 1996

LUCAS
Chief Justice

APPENDIX G

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE Plaintiff and Respondent, v. MITCHELL ALFRED PATTERSON, Defendant and Appellant.	)	C019177 (Super. Ct. No. 49140) FILED: Nov. 6, 1995

A jury convicted defendant of first degree murder after he carried his 10-year-old daughter onto Interstate 80 and threw her in front of a semi truck. On appeal, defendant raises issues involving the sufficiency of the evidence of premeditation and deliberation, the restriction of expert testimony, and instructional error. We affirm.

FACTS

Defendant suffers from depression and was hospitalized in 1989 for attempting suicide. Although prescribed psychotropic medication, he discontinued its use.

On March 30, 1993, defendant had not slept in three days and was experiencing serious marital and financial problems. On that day, defendant, his wife, and their three children arrived at the Willits home of defendant's in-laws. He later left with his 10-year-old daughter Adrianna to buy ice cream. As they were leaving, he told his mother-in-law that his wife "will be happy here. This is where she's always wanted to be." When the two did not return, defendant's wife called the California Highway Patrol.

Defendant drove Adrianna to San Francisco, where he drove back and forth across the Golden Gate Bridge at least twice. The following morning, witnesses saw defendant's pickup truck parked on Interstate 80 near Floriston, roughly 10 miles east of Truckee.

At approximately 11:30 a.m. on March 31, 1993, defendant telephoned his wife from a passing motorist's car phone, and asked her to send his sister to pick him up. Defendant's sister departed to pick up defendant and Adrianna between noon and 1 p.m.

Several motorists testified to seeing defendant and a young girl walking along Interstate 80 between 11:30 a.m. and 1:25 p.m. Between 1:20 and 1:25 p.m., as defendant and Adrianna remained alongside the freeway eating a sandwich given them by a passing motorist, a semi truck approached. When the truck was within 100 feet, defendant grabbed Adrianna and ran onto the freeway. The driver swerved into another lane, but defendant continued, and with a "determined" expression, lunged at the truck. Adrianna was killed; both defendant's hands were fractured.

Defendant offered inconsistent explanations for his behavior, first contending it was an "accident" and

subsequently asserting he was mentally ill, was hallucinating, and believed he had to kill himself and Adrianna to avoid a bizarre and tortured death.

Defendant pled not guilty and not guilty by reason of insanity. At the conclusion of the guilt phase, the jury found defendant guilty of first degree murder. In the sanity phase, the first jury deadlocked and the court declared a mistrial. After retrial, the jury found defendant sane. The court imposed a sentence of 25 years to life.

DISCUSSION

I

Sufficiency of the Evidence

Defendant first argues there was insufficient evidence of premeditation and deliberation to support his conviction for first degree murder in the guilt phase. We disagree.

"Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]" *(People v. Perez* (1992) 2 Cal. 4th 1117, 1124.)

Defense counsel argues defendant "loved and cared for his daughter" and "[o]n the day of Adrianna's death [defendant] suddenly and inexplicably grabbed his daughter and rushed in front of an eighteen-wheel semi truck and trailer." However, two psychiatrists testified "it is becoming more common . . . that individuals who follow through with the act of suicide take with them some significant other love object . . . ." From the evidence presented, the jury reasonably could have inferred defendant planned to kill Adrianna as part of his own suicide and had considered this outcome before leaving the home of his parents-in-law, as indicated by his parting

comment to his mother-in-law. Depressed over serious marital and financial problems and not having slept in several days, defendant drove Adrianna to the Golden Gate Bridge, a "magnet" for suicidal individuals. Defendant was "probably suicidal" at that point and crossed the bridge at least twice. Defendant then left the Bay Area and eventually parked along Interstate 80 near Floriston.

Evidence also supports the conclusion that after lingering alongside the freeway for several hours, "actively suicidal," and knowing his sister was due to arrive momentarily, defendant finally took definitive action upon seeing the truck. He carried out his calculated decision to kill Adrianna by picking her up, running directly at the oncoming truck only 100 feet away with a "determined" expression on his face, and lunging at the truck when the driver swerved into another lane. Defendant himself testified he had been thinking about killing himself and Adrianna, acknowledged he had seen the truck coming and ran out into the road to kill himself, and testified he had known they both would be killed if he got in front of the truck. After the accident, defendant told police he "quit thinking about it and . . . just did it."

"[P]remeditation [and deliberation] can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment maybe arrived at quickly . . . . [Citations.]" (*People v. Perez, supra*, 2 Cal. 4th at p. 1127, internal quotation marks omitted.)

Substantial evidence supports the jury's finding of premeditation and deliberation.

II

Expert Testimony

Defendant argues "the trial court erred by restricting defense expert testimony on the question of whether [he] was thinking logically or was in touch with reality on the day of the offense." (Capitalization omitted.) (AOB 43)

Penal Code section 29 provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

Penal Code section 29 "does not forbid an expert from stating his opinion about the accused's mental state . . . . Section 29 preclude [s an expert] only from testifying whether defendant had one of the mental states required for the offenses--for example, malice aforethought. That ultimate determination must be made by the trier of fact." (People v. McCowan (1986) 182 Cal.App.3d 1, 14.) Section 29 permits a defendant "to introduce psychiatric testimony regarding his mental condition at the time of the offenses," but precludes him from "asking his psychiatrist whether the requisite mental state existed." *(Ibid.)*

Defendant asserts the trial court "carried the Section 29 ban beyond the mental state elements of the offense, and prohibited evidence which could have undermined a verdict of guilt on the elements of malice and premeditation. During the presentation of the testimony of defense witness Melvin Winer, M.D., counsel sought to establish that appellant lacked insight and was not aware of his mental illness at the time of Adrianna's death." The record does not support defendant's

contention. Although the trial court sustained several objections to the witness's testimony, the transcript reflects that the witness did testify as to this very point. Moreover, an exchange between the trial judge and counsel outside the jury's presence reflects the judge's comprehension of this issue.

In response to questions from defense counsel, Dr. Winer testified:

"Q In your experience as a psychiatrist is it unusual for somebody suffering from a mental illness to be unaware of the fact that they're suffering from a mental illness?

"A Most individuals are unaware that they are suffering from mental illness.

"Q Is there a psychiatric term for that sort of state?

"A Lack of insight.

". . . . . .

"Q With specific reference to [defendant], after talking to him, after reviewing the records that were provided you and talking to relatives, do you have an opinion as to whether or not he understood that he had a mental illness on March 31st, 1993?

"A No, I don't.

". . . . . .

"Q Do you have an opinion as to whether on March 31st, 1993 [defendant] was in touch with reality?[1] . . .

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1. The prosecutor objected to this question, but the trial judge

"A No, he was not."

Due to the frequency of the prosecutor's objections, the trial judge asked the jury to wait in the hallway and discussed the ramifications of section 29 outside the jury's presence. The trial judge observed: "[F]rom what I understand, the expert can be asked questions about the nature and extent of the defendant's mental disease or defect. And from that defense counsel may argue the effect of that mental disease or defect on the question of whether or not the defendant actually had certain mental states. What the defendant may not ask the expert is [sic] questions as to whether or not the defendant actually had those mental states or lacked the capacity to form those mental states . . . ."

The judge continued: "[Dr. Winer has] already testified that in his opinion there were hallucinations. He's already testified in his opinion I think there were some operative delusions on the day of the incident. He's testified to some of the characteristics of his diagnosis . . . ."

After a brief recess, the judge cited additional case law and stated: "Clearly it would not be inappropriate to ask the doctor even under Section 29 if the diagnosed mental disorder had a major impact or a significant impact on his mental process on the day of the incident . . . . [¶] . . . I'm going to allow what the case law has previously allowed as meeting the due process standards which is testimony concerning the impact of the disorder on the defendant's mental processes at the time of the incident and testimony concerning how in this witness's opinion how he was thinking at the time of the incident as affected by the disorder . . . ."

When proceedings before the jury resumed, Dr. Winer diagnosed defendant as having a bipolar disorder with psychotic features and stated he believed

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never ruled on the objection. Accordingly, Dr. Winer's answer stood.

defendant was suffering from a mental illness at the time of the incident. Defense counsel asked Dr. Winer the effect of a bipolar disorder upon an individual's conduct and thought processes, and Dr. Winer testified "[defendant's] mind was overwhelmed with paranoid delusions. His mind was overwhelmed with delusions that he was going to be annihilated." Dr. Winer also testified such mental illness often is not noticeable to a third party because the patient can hide his psychotic fears.

Defendant claims the trial court "was unwilling to permit testimony on subjects such as whether the defendant was acting rationally . . . . When the jury returned Dr. Winer continued to testify, but no further questions were asked as to whether [defendant] possessed insight into his own mental condition."

The trial court permitted expert testimony as to the fact of defendant's mental illness and defendant's hallucinations and delusions. Dr. Winer had already testified he had no opinion with regard to whether defendant was aware of his own mental illness. We find no error.

III

Jury Instructions

Defendant raises three contentions of instructional error which we address in turn.

A. Presumption of Sanity

At the guilt phase of the trial, the court instructed the jury that a defendant is presumed sane. (See Pen. Code, § 1026, subd. (a).) Defendant challenges this instruction, noting no CALJIC instruction exists for this proposition and asserting the instruction undermined his effort to raise a reasonable doubt as to his mental state. The challenge is meritless.

The challenged instruction reads: "At the time of the alleged offense charged in the information, you are instructed to presume the defendant was sane." Penal Code section 1026 provides in pertinent part: "(a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed."

"[I]nstructions must be viewed as a whole and in light of other instructions given by the court to the jury."[2] (*People v. Russell* (1971) 22 Cal.App.3d 330, 336.) Immediately before the challenged instruction, the court instructed the jury: "Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state or specific intent which is an element of the crime charged in the information, and are found in the definitions of murder. [¶] If from all of the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent." Accordingly, the combination of the two instructions set forth the correct balance, and did not tell the jury to ignore the mental state evidence.

At oral argument, echoing a weak statement from his opening brief, defendant argued it was error to

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2. At oral argument, defendant cited *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344], which concerned jury instructions that effectively relieved the State of its burden of proof on criminal intent. As explained above, the trial court expressly instructed the jury it could consider evidence of defendant's mental disability in determining whether he formed "the mental state or specific intent" necessary for murder. We find *Francis* inapposite.

give this instruction because it precluded the jury from considering the evidence of his mental instability in making its guilt phase determination. Defendant cites no authority for this proposition, and his assertion of error is unsupported by the record.

Defendant pled not guilty and not guilty by reason of insanity, and accordingly his trial was bifurcated. (See *People v. Phillips* (1979) 90 Cal. App. 3d 356, 362; *People v. Guillebeau* (1980) 107 Cal. App. 3d 531, 542.) It is undisputed that the trial court correctly advised the jurors (1) that the case would be tried in two parts, a guilt phase and a sanity phase, and (2) that defendant was presumed sane in the guilt phase. By giving the challenged latter instruction, the trial court merely told the jury it could not consider in the guilt phase whether defendant was insane. (See *People v. Smith* (1973) 33 Cal. App. 3d 51, 75, overruled on other grounds, *People v. Wetmore* (1978) 22 Ca1.3d 318, 324.)

Evidence of defendant's mental condition was fully developed and argued by both sides, and the trial court never told the jury it could not consider evidence of defendant's mental condition as it bore on issues pertinent to guilt. The trial court fully instructed the jury relative to its duty to consider the evidence of defendant's mental condition and the prosecution's burden to establish defendant's guilt beyond a reasonable doubt. Defendant's opening brief asserts, "[b]y instructing the jury that the defendant is presumed to be sane, the trial court in effect told the jury that evidence raising a doubt of appellant's mental state at the time of the incident was not relevant or worthy of belief." However, something more is required than defendant's mere assertion the instruction had this effect or somehow affected the burden of proof. We note trial counsel did not take issue with the challenged instruction. This is an important point because trial counsel was better positioned to assess and pursue the matter.

We find no basis in this record for finding a reasonable juror would be misled by the challenged instruction.

B. *Argumentative Pinpoint Instructions: Guilt Phase*

Defendant contends "[t]he trial court erred by reading prosecution pinpoint instructions on specific items of evidence offered to establish guilt." (Capitalization omitted.) He argues we must reverse his conviction because CALJIC Nos. 2.03, 2.13, and 2.20 were "impermissibly argumentative," "unfairly focused on the rampant inconsistencies in [his] statements," and "focus[ed] undue skepticism on [his] tortured efforts to come to terms with his own irrational acts." He is mistaken.

It is improper to select "'certain material facts, or those which are deemed to be material, and endeavor[] to force the court to indicate an opinion favorable to the defendant as to the effect of such facts, by incorporating them into instructions containing a correct principle of law . . . . An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" *(People v. Wright* (1988) 45 Ca1.3d 1126, 1135.) Accordingly, a court must "refuse an argumentative instruction, that is, an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' (Citations.]" *(People v. Mincey* (1992) 2 Ca1.4th 408, 437.)

The logic of defendant's argument would compel the elimination of all jury instructions pertaining to any evidence in any manner. Defendant reads *Wright* "far too broadly, as calling for elimination of jury instructions which focus the jurors' attention on particular categories of evidence." (See *People v. Fitzpatrick* (1992) 2 Ca1.App.4th 1285, 1296-1297.) We set forth the text of

the challenged instructions in the margin.[3] None of the challenged instructions incorporates specific items of evidence on a disputed question of fact urging the jury to draw inferences favorable to the prosecution. No specific items of evidence are mentioned in these instructions. Rather, defendant essentially argues that, *as applied,* these

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3. Pursuant to CALJIC No. 2.03, the trial court instructed the jury: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination."

Pursuant to CALJIC No. 2.13, the trial court instructed the jury: "Evidence that on some former occasion, a witness made a statement or statements that were inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion. [¶] If you disbelieve a witness' testimony that he or she no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him or her describing that event."

Pursuant to CALJIC No. 2.20, the trial court instructed the jury: "Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. [¶] In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or the ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness has testified; The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying; [¶] The existence or nonexistence of a bias, interest, or other motive; [¶] Evidence of the existence or nonexistence of any fact testified to by the witness; [¶] The attitude of the witness toward this action or toward the giving of testimony; [¶] A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness; [¶] An admission by the witness of untruthfulness."

instructions constituted argumentative pinpoint instructions because the instructions drew attention to the inconsistencies in his accounts of the incident.

The California Supreme Court has rejected the contention that CALJIC No. 2.03 is an argumentative pinpoint instruction. In *People v. Kelly* (1992) 1 Ca1.4th 495, the Supreme Court noted: "Defendant contends that CALJIC No. 2.03 is in effect a pinpoint instruction favorable to the prosecution, and it is no longer appropriate under the *Wright* analysis. [¶] CALJIC No. 2.03, however, does not merely pinpoint evidence the jury may consider. It tells the jury it may consider the evidence *but it is not sufficient by itself to prove guilt.* [Citation.] . . . If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider evidence. Nothing in *Wright* affects such an instruction. There was no error." *(Id.* at pp. 531-532, italics in original; see also *People v. Wimberly* (1992) 5 Ca1.App.4th 773, 795-796 ["reject[ing] appellant's argument that CALJIC No. 2.03 is an erroneous pinpoint instruction"].)

The same logic applies to CALJIC Nos. 2.13 and 2.20. We note these latter two instructions apply to credibility determinations for all witnesses -- both prosecution and defense -- not just to the defendant. Neither CALJIC No. 2.13 nor 2.20 specifies items of evidence. Moreover, these instructions merely provide guidelines in assessing evidence and do not mandate a particular outcome. Accordingly, the challenged instructions do not constitute argumentative pinpoint instructions.

C. *Argumentative Pinpoint Instructions: Sanity Phase*

Pursuant to *People v. Wright, supra*, defendant challenges four jury instructions given in the sanity phase - CALJIC Nos. 2.13, 2.20, 2.21.2, and 2.71 -- as argumentative pinpoint instructions. Defendant asserts

these instructions "focused undue attention on the inconsistent accounts voiced by [defendant]."

We rejected defendant's challenges to the use of CALJIC Nos. 2.13 and 2.20 in the guilt phase. We reject defendant's second attack on these two instructions based on their use in the sanity phase for similar reasons.

With respect to defendant's challenge to CALJIC No. 2.21.2,[4] this instruction "does nothing more than explain to a jury one of the tests they may employ in resolving a credibility dispute." (*People v. Blassingill* (1988) 199 Cal.App.3d 1413, 1419; see also *People v. Lang* (1989) 49 Ca1.3d 991, 1023 [upholding CALJIC No. 2.21].) It applies to credibility determinations of all witnesses, both for the prosecution and for the defense, and not just to the defendant. CALJIC No. 2.21.2 does not specify items of evidence, but instead merely provides guidelines in assessing evidence and does not mandate a particular outcome. CALJIC No. 2.21.2 is not an argumentative pinpoint instruction.

Finally, defendant challenges CALJIC No. 2.71, as modified.[5] Defendant argues, "CALJIC 2.71 was

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4. Utilizing CALJIC No. 2.21.1 and 2.21.2, the trial court instructed the jury: "Discrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to trivial detail should be considered in weighing its significance. [¶] A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

5. The trial court instructed the jury: "An admission is an out-of-court statement made by the defendant, other than one made to a psychiatrist, which is offered against him by the prosecution as tending, when compared with the other evidence, to discredit his

substantially modified to pinpoint an admission by the defendant, defined as an out-of-court statement which is offered against him as tending 'to discredit his claim of legal insanity,'" and that, as so modified, the instruction was argumentative. In particular, defendant asserts "[a]lthough the defense struggled to convince the jury that the inconsistent accounts were due to [defendant's] mental disorder and his effort to come to terms with the enormity of the tragedy that had befallen him, the instructions from the bench were weighted entirely to the effect that the inconsistencies could be construed against the claim of insanity."

Defendant misapprehends the import of this instruction. The instruction addressed only admissions, not inconsistent testimony generally.[6] The instruction exempted any statement to a psychiatrist, and explained (1) the jurors were the "exclusive judges" as to whether defendant made any admission; (2) if the jury found defendant did not make an admission, the jury must reject evidence of it; (3) if the jury found defendant did make an admission, the jury could give the admission "whatever weight" the jury deemed the admission entitled; and (4) the jury was instructed to view "an unrecorded, oral admission of the defendant not made under oath" with caution.

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claim of legal insanity. [¶] You are the exclusive judges as to whether the defendant made an admission. If you should find that the defendant did not make a particular admission, you must reject evidence of it. If you should find that an admission was made, you may give that admission whatever weight you deem it to be entitled. [¶] Evidence of an unrecorded, oral admission of the defendant not made under oath ought to be viewed by you with caution."

6. In his reply brief, defendant argues the trial court erred in giving CALJIC No. 2.71 in the sanity phase because "[o]ne does not 'admit' sanity . . . in the same way one 'admits' guilt." However, the instruction was appropriately tailored to define an admission as "an out-of-court statement . . . tending, when compared with the other evidence, *to discredit his claim of legal insanity.*" (Italics added.)

Far from presenting specific evidence and then attempting to skew the jury's perception of the evidence in the prosecution's favor, the challenged instruction presented the applicable principle of law pertaining to admissions and indicated no opinion as to any fact in issue. This is not an argumentative pinpoint instruction, and we find no error.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

SCOTLAND, J.

APPENDIX H

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. section 1254 provides in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. section 2253 provides in pertinent part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

28 U.S.C. section 2254(a) provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

> custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. section 2254(d)(1) provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

28 U.S.C. section 2254(e)(1) provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

California Penal Code section 187, subdivision (a), provides:

> (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

California Penal Code section 1026, subdivision (a), provides in pertinent part:

> (a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed. If the verdict or finding is that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law . . . .

California Penal Code section 1192.7, subdivision (c)(1), provides:

> (c) As used in this section, "serious felony" means any of the following:
> (1) Murder or voluntary manslaughter.

APPENDIX I

JURY QUESTIONNAIRE

DIRECTIONS

This questionnaire has been prepared to assist the Court and the parties in determining whether or not you may have had personal experiences or knowledge about the issues to be decided by the jury. Acquaintance with any of the parties, the lawyers or potential witnesses should also be disclosed.

This questionnaire is part of the record of a public trial. Please answer the questions honestly and with care. Your full and complete answers are desired.

Please note there are no right or wrong answers to any question. In the event that some of the questions call for sensitive personal information which you wish not to disclose please indicate that in your response by writing 'private' in the answer space or at the last question. You will be provided an opportunity to speak with the judge and the attorneys outside the presence of other jurors.

Please fill out completely in ink and **print** your answers. Since we need to make copies, do not write on the back of any page. If you need more room, continue at the bottom or side of the page, or on the last page, or request extra paper, (noting question number). Please complete this questionnaire by yourself and do not consult with anyone else. If you cannot recall a fact please note.

QUESTIONS

1. NAME:
   Age: Sex:
2. Place of Birth:
3. What neighborhood or area do you live in within the County?
   How long have you lived at that location:
   Do you own or rent your home?
   What other communities have you lived in?

4. What is your current job status?

____ working full-time	____ unemployed
____ working part-time	____ homemaker
____ retired	____ full-time student

5. OCCUPATION: (If retired or unemployed, answer regarding last job.)
   a. What is your occupation?
   b. By whom are you employed?
   c. For how long?
   d. What are your specific duties on the job?
   e. Where did you work previously and what did you do?
   f. Have you ever been a supervisor or had hiring or firing responsibilities?
      Yes No

   If yes, please describe:

6. What is the last level of education you completed?
   Grade school or less
   Some high school
   High school graduate
   Technical or business school
   Some college
   College graduate
   Post graduate work
   Attend law school

Please describe your educational background, including vocational school and/or colleges attended:

Name of school	Area of study	Degrees received

7. Please list any courses you have taken since your formal education. Please include credit and non-credit, self-improvement, seminars, religious, professional, or other courses of any kind:

a. Have you taken an courses in law, legal procedures, or criminal justice, or psychology? (If yes, please describe:)

8. What is your marital status?
   Single and never married
   Currently married and have been for ___ years
   Single, but married in the past for ___ years
   Single, but living with non-marital mate for ___ years
   Widowed/widower, married in the past for ___ years
   Other
9. Is your spouse or non-marital mate employed?
   Yes No
   a. If yes, what does he/she do and where is he/she employed?
   b. What other sorts of job has he/she had?
   c. If spouse/mate is not employed, what work outside the home has he/she ever done?
10. Please describe your spouse or non-marital mate's educational background? (Include last level of education completed and area(s) of study.)
11. If you have children, please state:

Name	Sex	Age	Lives w/you	Education	Occupation

12. What are your hobbies, major interests, recreational pastime and spare-time activities, including sports?

13. Please list all groups or organizations in which you participate or are a member. For example, service clubs, church or church groups, unions or professional organizations, volunteer activities, education or political groups:

14. Would you please check the income grouping which comes closest to describing your total family income before taxes:

    Under $10,000
    $10,000 - $19,000
    $20,000 - $29,999
    $30,000 - $49,999
    $50,000 - $74,999
    $75,000 or more

15. Do you know or have contact with any of the following people, businesses, law firms or agencies: Check by name if yes.

Charles Prebble
Gary Swanson
R. L. Riley
Ty Brown
Ken Osburn
Sgt. Berquist
William Benson
Judy Frank
Deputy Stanovich
Gary Boto
Guy Mohun
Liz Rehkop
Mike Hanson
Ron Perrea
Dr. M. McQuarrie
Dr. Joseph Tripoli
Dr. Irwin Lyons
Dr. Robert Bittle
Dr. Captane Thomson
Dr. Melvin Winer
Dr. Krissoff
Randy Nordmark
Kimberly Nordmark
Sheila Patterson
Laurel Hodges
Austin Hodges
Dave Sweetland
Virgil Maldonado
Dean Martinez
Diana Beidel
Kay Holleran
Joann Toulouse
Capt. Jack Bayer
Bob Boyer
Beverly Ends
Carolyn Mulpus
Gene Welch
Paul Lastuflca
Donald Foreman
Don Bossingham
John Sattler
Bill Evans
Judith Tye
William Morrow
Joe Aguera
Katherine Delp
D. Slominski
Nevada Co. Public Defender
Nevada Co. Sheriff

Nevada Co District Attorney
California Highway Patrol

16. Were you ever in the military? Yes No
    a. What branch:
    b. Dates of service:
    c. Rank or job:
    d. Where stationed:
17. What is your primary source of news? (Include name of newspaper and/or TV/radio station.)
18. What newspapers and magazines do you read regularly?
19. Do you belong to any religious organization or group that would prevent you from being able to decide this case? Yes No
    If yes, please explain:
20. Do you believe you would not be morally or philosophically able to make a decision in this case? Yes No
    If yes, please explain:
21. Do you belong to any organization or group that advocates a change in the jury system or the way juries approach the law? Yes No
    If yes, please explain:
22. Have you, your family members or close friends ever had a bad experience with law enforcement officers or prosecutors? Yes No
    If so please explain where, when and the circumstances:
23. Do you, have negative feelings about the Nevada County District Attorney's Office, California Highway Patrol, Nevada County Sheriffs Office, for any reason? Yes No
    If yes, please explain:
24. Do you feel you can give both the Defendant and the People a fair trial:
    Yes No

If no, please explain:

25. Are you a member of any group which advocates changes in the criminal law:
    Yes No
    If YES, please explain:
26. Have you, any relatives or close friend ever been employed by a law enforcement agency such as police, sheriff, highway patrol, IRS, FBI, parole, probation, jail or prison, drug enforcement agency, Immigration and Naturalization Service (INS), police reserve, National Guard, Customs, District Attorney, or United States Attorney General? Yes No
    If yes, please describe employment:
27. Have you or anyone close to you ever been the victim of a crime? (Including burglary, robbery, assault, etc.) Yes No
    If yes, please describe details:
    Were there any legal proceedings: (Please describe)
28. Have you ever been a witness to a crime, filed a report or other written document with the policy or other law enforcement agency, or had contact with the District Attorney's Office? Yes No
    If yes, please provide details:
29. Have you ever been called as a witness or given a deposition in any legal matter?
    Yes No
    If yes, please describe details:
30. Have you, or anyone close to you, ever participated in any group concerned with crime prevention or victim's rights (MADD etc.)?
    Yes No
    If yes, what group was this, please describe its purpose and your participation in it:
31. Have you, or anyone close to you, ever participated in any group which advocates for individual tights (ACLU etc.)? Yes No
    If yes, please state the group, its purpose, and the nature of your participation:

32. Have you ever served as a juror in the past?
Yes No
a. If YES, please provide the following information for each case:

Criminal or Civil	Charges/ Issues	When Served	Did Jury Reach A Verdict

b. How did you feel about your jury service?

33. Do you know any lawyers or judges? Yes No
If YES, what kind of law do they practice?
Please provide their names and relationship to you:

34. Have you, a close friend; or a relation ever been:
Arrested or charged with a crime? Yes No
In prison or jail? Yes No
Subject of an investigation Yes No
Expect to be subject of investigation Yes No
If yes, please explain:

35. Have you heard of the term "circumstantial evidence"? Yes No

36. Do you realize that circumstantial evidence is a fact or facts that you may reasonably infer from another fact or set of facts? Yes No

37. Is there any reason you would refuse to consider circumstantial evidence as a means of proving the facts in this case? Yes No
If yes, please explain:

38. Do you agree, Circumstantial Evidence may be the only way to ascertain a person's intent or mental state? Yes No

39. Would you reject circumstantial evidence as a means of proving specific intent or mental state?
If yes, please explain:

40. Have you studied psychiatry or psychology either formally or informally? Yes No

If yes, explain:

41. Have you read any books which have concerned themselves with psychiatric concepts or theories? Yes No
If yes, explain:
42. Do you have any relatives or close friends who are psychiatrists or psychologists? Yes No
If yes, explain:
43. Have you discussed with this individual the nature of his work or the concepts or theories in which he believes? Yes No
If yes, explain:
44. Has your friendship with this individual caused you to form any opinions either for or against psychiatric testimony? Yes No
If yes, explain:
45. Because of this friendship, would you be predisposed to accept the conclusions of a psychiatrist without testing the reasonableness of his opinion against the evidence and your common sense background? Yes No
If yes, explain:
46. Have any of your relatives or close friends ever been diagnosed as having a mental illness or hospitalized for mental illnesses? Yes No
If yes, explain:
47. Have you ever been treated by a psychiatrist or psychologist? Yes No
If yes, explain:
48. Have you ever taken any psychological tests? Yes No
If yes, explain:
49. Do you believe the results of psychological tests are always correct - infallible? Yes No
If yes, explain:
50. Do you agree the results may be subject to different interpretations? Yes No
51. Do you think psychiatry is an exact science such as mathematics? Yes No

52. Would you agree that the opinion given by a psychiatrist is necessarily based on his interpretation of what he has examined?
    Yes No
53. Have you heard of one doctor diagnosing a case one way and another doctor diagnosing a different way? Yes No

54. Do you believe that any of these people are necessarily dishonest because they interpret differently, do you? Yes No

55. If you find that a psychiatrist's opinion is unreasonable to you, based upon <u>your</u> view of the evidence and <u>your</u> common sense background, will you be able to reject an unreasonable opinion? Yes No
56. There are some people who read of a particular crime and might say to themselves,"Well, there's got to be something wrong with an individual who does something like that." Some people might react that way, don't you think?
    Yes No
    a. Do you agree that in this case, where there may be a defense of insanity, if you start out with that preconceived notion before hearing the evidence, then you will not be sitting as an impartial juror? Yes No
    b. From the nature of the charge itself, would you hold such a preconceived notion? Yes No
57. Do you have any feeling that a person who kills his own child must necessarily be mentally ill or crazy? Yes No
    If yes, explain:
58. Insanity, as referred to in this case, is a legal term not a medical term. Do you agree a person

can be mentally ill and under the law not insane? Yes No
Do you have a problem with that aspect of the law? Yes No

59. Would you wait to hear all the evidence before deciding to accept or reject any evidence including psychiatric testimony? Yes No
60. Do you appreciate that an expert witness, such as a psychiatrist or psychologist, is only here to help you decide the facts, but not to tell you what to think? Yes No
61. Before giving any weight to the testimony of an expert, would you be interested in the reasons that cause the expert to reach his opinion? Yes No
62. Do you accept the fact that psychiatrists and psychologists are after all human beings and they have to make judgments and decisions based on whatever tools they use? Yes No
63. Would you agree that any test in and of itself does not define somebody's state of mind; it has to be interpreted by another human being, doesn't it? Yes No
64. Do you agree that the results which are obtained from the use of any of the diagnostic tools that may be available to the experts are going to depend upon the validity of those tools and how they apply them? Yes No
65. Will you perform your function and decide whether the underlying reasons given for an opinion are reasonable and worthy of acceptance? Yes No
66. If the expert bases his opinion in part upon what the defendant told him, will you look at the defendant's statement to see if you think the defendant was telling the doctor the truth or not? Yes No

67. And, if you should find that the defendant told the doctor something that you find not to be factual, will you then evaluate the weight of the expert's opinion in light of such fact? Yes No
68. Have you ever heard the term Paranoid, Paranoid Personality, Manic/Depressive or Bipolar Disorder? Yes No
Have you ever known a person who has been diagnosed or paranoid or paranoid personality? Yes No
69. The charge in this case is murder. A human being was killed. Is there anything about the nature of this case which would make it difficult for you to listen and keep and open mind?
Yes No
70. There may be some graphic photographs of the crime scene and/or autopsy presented in this case. Is there anyone who would have difficulty viewing and considering such evidence?
Yes No
71. Do you think you would have a difficult time listening to and considering graphic testimony regarding the killing of a human being?
Yes No
72. The charge in this case involves the killing of a human being. It is a very serious and potentially emotional matter. There may be friends and relatives of both the defendant and the deceased in the court at various times. Will you be strong enough to reach a verdict <u>based solely on the evidence and the law</u> in spite of any feelings of sympathy you may have for either side? Yes No
73. Will you agree not to discuss the matter of possible penalties or punishment in this case or allow it to influence your deliberations in any way. I will advise you at this time, however, that this is not a death penalty case? Yes No
74. The standard of proof in <u>any</u> criminal case is proof beyond a reasonable doubt. It is the same

for a murder case as it is for a simple trespass or any other charged crime. Occasionally, some jurors believe the standard in a murder case should be higher because the consequences of a conviction may be serious. As I have said, however, the standard is no higher than in any other criminal case. Do you think it should be? Yes No
Would you be willing to apply the beyond a reasonable doubt standard to this case even though you personally think the standard should be higher?
Yes No

75. A defendant in a criminal case is presumed to be innocent until the contrary is shown and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. The People, therefore, have the burden of proving the Defendant guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. Do you have any problem with this standard of proof? Yes No
If yes, please explain:
76. Do you have any physical or medical problems which would make jury duty difficult for you? Yes No
77. Do you have any difficult with your vision or hearing? Yes No
If yes, please explain:

78. Is there any other information that you would like the court to know about your ability to serve as a juror in this case?

79. Is there any matter you would prefer to discuss privately with the court?

Yes No

I declare under penalty of perjury that the foregoing is true and correct. Executed this day _____ of November, 1993 at Nevada City, California.

Signature:_____